No. 15369

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UTILITY APPLIANCE CORPORATION, a Corporation,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S REPLY BRIEF.

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I.

Respondent Confuses the Issue. The Taxes Involved Are Solely Excess Profits Taxes for 1944, and the Issue Is Whether, in Computing the Excess Profits Taxes for That Year, the Timely Claims, as Properly Amended, Embraced the Use of a CABPNI, Not Only for 1943 and 1944, Which Was Allowed, but Also for 1945.

Respondent throughout his brief confuses the issue. As respondent again and again frames the issue (Br. 4, 12-13, 15, 30, and 36), and as he again and again declares (Br. 13, 32, and 34), it would appear that petitioner never, within the statutory period, requested a carry-back of unused excess profits credit from 1945 to 1944, and also that no CABPNI was ever allowed in that computation. That is not true.

A carry-back of unused excess profits credit from 1945 to 1944 was *specifically requested* by petitioner from the very beginning (Br. 6) and was allowed by respondent as far back as November 25, 1946 (Br. 6), as well as in a revenue agent's report dated June 10, 1947 (Br. 5), and again in the deficiency notice (Br. 4-5).

Before the Tax Court, moreover, respondent conceded that, *in computing that carry-back,* the excess profits credit for 1943 was properly determined by use of a CABPNI (Br. 5). The only question is whether, in computing that same carry-back, from 1945 to 1944, a CABPNI should also be used for 1945. There is no other question here.

II.

Respondent Erroneously Represents the Contents of the Application for Relief Timely Filed. The Claim of CABPNI Therein Was General and Applied as Well to Any Year Involved in the Computation of Excess Profits Taxes for 1944.

Respondent erroneously represents the contents of the application for relief, Form 991, filed by petitioner on May 15, 1945. Respondent depicts that form as if, in the computation of relief for 1944, it specifically requested the use of a CABPNI for 1944, but not for 1943 or 1945 (Br. 7, 8, 14, 27, 31, 32). This is clear error.

This court need not speculate as to what that form contained. It is included in Document 11 as joint exhibit 5-E.* It does claim a CABPNI of $161,058.71, and it does make that claim for the purpose of comput-

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*The printing of this document has been requested.

ing the excess profits taxes for 1944. But it does not say that, in the computation of the excess profits taxes for 1944, the CABPNI claimed should be applied to 1944, or to any other specific year. In an attached schedule that figure of $161,058.71 is claimed only as the final figure under a schedule entitled "Constructive average base period net income," and on page 2, line 6, of the application 95% of that sum, or $153,005.78, is claimed as the "Amount of constructive average base period net income claimed for use in computing excess profits tax for taxable year." It does not say that, "in computing excess profits tax for taxable year," the figure given should be applied only to 1944. Indeed, the very contrary is to be implied. The implication is that that figure is to be applied to *every year involved in computing excess profits tax for 1944.*

Here 1943, 1944, and 1945 were all involved in the tax computation for 1944, and the CABPNI could be applied to all three, and the amount in each case is necessarily, and as respondent has agreed, the same. In his deficiency notice respondent applied it only to 1944; before the Tax Court he conceded that it should also be applied to 1943; and the only question here is whether it should also be applied to 1945. But the form filed by petitioner did not specify any one of the years.

It is obvious, of course, that the person who prepared the forms for petitioner did not know one year from the other in this connection. He did not even carry on to the Form 843 filed February 28, 1949, the computation of unused excess profits credit made in the report of the revenue agent dated June 10, 1947 (Br. 5, 8). Respondent disregarded that omission. It was respondent

who, in his deficiency notice, became specific by applying the CABPNI to 1944 and including the carry-back computed without CABPNI.

Nor is the degree of specificity of the claim as vital as respondent assumes. In *United States v. Memphis Cotton Oil Company,* 288 U. S. 62, 53 S. Ct. 278, the Supreme Court stated, 288 U. S. at p. 70:

> "No matter though the claim for refund be specific and limited, the Commissioner is at liberty to audit the return afresh and to strike a new balance as the facts may then appear."

III.

Petitioner Fully Satisfied the Requirements of the Regulations.

As respondent points out (Br. 27), the regulations required that the taxpayer in its application for relief set forth in detail "each ground *under Section 722* upon which the claim for relief is based, and facts sufficient to apprise the Commissioner of the exact basis thereof." (Italics added). But the record shows that petitioner did do this as to each ground *under Section 722.* That information was identically the same for every excess profits tax year, and the Commissioner made a determination based upon it for every such year.

The record is also clear that petitioner, during the statutory period for filing claims, not only apprised the Commissioner of the basis of each ground *under Section 722,* but fully apprised the Commissioner that he claimed the carry-back of unused excess profits credit. There was (1) the specific claim for such credit, allowed November 25, 1946 (Br. 6), (2) the allowance of such credit in the revenue agent's report dated June 10, 1947 (Br. 5), (3)

the reference to carry-back in an official letter dated December 3, 1948 (Br. 9), and (4) the discussions prior thereto in respect to carry-back in conferences with the revenue office under Section 722 (Br. 10). Indeed, respondent conceded that the CABPNI should be applied to one of the years involved in the carry-back for the 1944 tax computation—1943. He only says that it should not be applied to the other year involved in that same computation—1945.

Yet, respondent does not and cannot say that the CABPNI would be any different for one year than for another. Whether 1941, 1942, 1943, 1944, or 1945, it is the same CABPNI, in amount, in origin, and in every other way. Petitioner timely requested a carry-back, and timely requested a CABPNI. With the tax involved so extremely complex, how much more specific can the taxpayer be?

IV.

If Petitioner's Application for Relief Was Not Sufficiently Specific in Respect to Use of a CABPNI for 1945 Then This Defect Was Fully Waived by the Commissioner's Consideration on the Merits of the Amendment in That Respect.

Respondent refers to the deficiency notice as showing the respondent did not waive any requirement of the regulations respecting a 1945 CABPNI (Br. 33, 35). What respondent appears to contend is that the waiver represented by consideration of the amendment on the merits was revoked by the deficiency notice.

In the case of *United States v. Elgin National Watch Co.* (C. A. 7), 66 F. 2d 344, cited in petitioner's opening brief, page 21, the situation was the same as here. There,

too, *after* consideration of amendments on the merits, and when the final decision to pay or not to pay arrived, the Commissioner raised the issue of the statute of limitations. In *United States v. Memphis Cotton Oil Company*, 288 U. S. 62, 53 S. Ct. 278, also cited on this point in petitioner's opening brief, the same thing happened. There the Supreme Court found, 288 U. S. at p. 71:

> "Of a sudden, at the end, the discovery is made that the inquiry is mere futility because the notice starting it in motion has departed in form from the requirements of a rule."

As the court there held, consideration of a claim on the merits constitutes a waiver of any defect of form and after such consideration any attempted revocation of the waiver which it constitutes comes too late. The court there said, 288 U. S. at p. 71:

> "If, however, he [the Commissioner] holds it without action until the form has been corrected, and still more clearly if he hears it, and hears it on the merits, what is before him is not a double claim, but a claim single and indivisible, the new indissolubly welded into the structure of the old."

V.

Section 322(b)(6) Should Be Liberally Construed to Give the Relief It Was Intended to Provide.

Respondent contends (Br. 36), that Section 722, being a relief measure, should be strictly construed. But that section is not being construed here. The section being construed is Section 322. Of that section the part specially applicable to carry-backs, Section 322(b)(6), was intended to extend, in the case of carry-backs, the statu-

tory period generally provided under Section 322 (b)(1). May we repeat the quotation from *Bonwit Teller & Company v. United States,* 283 U. S. 258, contained in petitioner's opening brief at page 17:

> "Manifestly it [the increase in time allowed] is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide."

VI.

Petitioner Is Precisely Supported by the Decision of the Eighth Circuit in the May Seed and Nursery Company Case.

Respondent relies heavily on *May Seed and Nursery Co. v. Commissioner* (C. A. 8), 242 F. 2d 151 (Br. 19, 26, 32). That case, however, not only does not support respondent; it directly and specifically supports petitioner here.

In that case the facts were identically the same as in the case here with one critical exception. In that case the amendment of the claim was made *after the claim had been fully considered and rejected.* No consideration on the merits followed the amendment. The court there stated:

> "Moreover, if the situation were one in which sec. 322(b)(1) had been satisfied otherwise, the Commissioner could, for reasons which he might deem sufficient, have allowed the application under sec. 722(a) to be amended, to make claim for the benefit of any unused excess profits credit for 1941, upon request on the part of the taxpayer to him, *at any time up to the final disposition of the application,* which occurred in 1952. Cf. Angelus Milling Co. v. Commissioner, 325 U. S. 293, 297, 65 S. Ct. 1162, 89 L. Ed. 1619; United States v. Memphis Cotton Oil Co., 288 U. S. 62, 53 S. Ct. 278, 77 L. Ed. 619." (Italics added.)

This is precisely what happened here. Petitioner submits therefore that the *May Seed and Nursery Co.* case clearly and fully supports its position.

Conclusion.

Petitioner states in conclusion that the sole question involved here is whether in computing its excess profits taxes for 1944 its timely claims as properly amended embrace the use of a CABPNI, not only for 1944, and 1943, which were allowed, but also for 1945. Petitioner further states that its claim of CABPNI was generally made in its application for relief and applied to every year involved in the computation of excess profits taxes for 1944, that is, 1943, 1944, and 1945. Petitioner in its application set forth in detail each ground under Section 722 upon which its claim for relief was based and the facts and information upon which the claim was based. Further, even if petitioner's application for relief was not sufficiently specific, this defect was waived by the Commissioner's consideration on the merits of the amendment filed by petitioner. Finally, Section 322(b)(6) is to be liberally construed in favor of the taxpayer in order to give the relief it was intended to provide.

Respectfully submitted,

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